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In The

Supreme Court of the United States

October Term, 1998

WILLIAM JEFFERSON CLINTON, ET AL.,

Appellants,

v.

MATTHEW GLAVIN, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF THE AMICUS CURIAE CITY OF OMAHA, NEBRASKA IN SUPPORT OF PLAINTIFF-APPELLEES GLAVIN, ET AL.

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INTEREST OF THE AMICUS CURIAE CITY OF OMAHA, NEBRASKA

The City of Omaha, Nebraska, submits this amicus curiae brief in support of the position of the plaintiff-appellees Matthew Glavin, et al. (hereinafter "plaintiffs"). The City of Omaha agrees that the statistical sampling method proposed for use in the 2000 census violates applicable statutes. As a municipality that would be directly and materially affected by an unlawful census, the City of Omaha particularly supports the plaintiffs' standing to bring the present action. The City of Omaha presents its perspective on the real and imminent injury that the proposed sampling methods pose to the county plaintiffs and similarly situated local government entities.

SUMMARY OF ARGUMENT

Plaintiffs have sufficiently pled and proven their standing to bring the present action, a challenge to the use of statistical sampling in the 2000 census. First of all, Congress has effectively removed any prudential limitations on the exercise of federal jurisdiction as to this specific type of action.

The remaining question is whether this action meets the three requirements for a justiciable "case" or "controversy" under Article III of the U.S. Constitution. To meet these tests a plaintiff must show that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

The plaintiffs submitted expert testimony establishing that the statistical sampling will result in vote dilution of the individual plaintiffs. The plaintiffs' evidence also shows that the county plaintiffs will experience a relative decrease in federal funding. Such programs as the Community Development Block Grant program, the Emergency Shelter Grant program, and the Home Investment Partnerships program are allocated to local governments in sums that are largely determined by population figures according to the census. Thus, the county plaintiffs, and other local governmental entities such as the City of Omaha, will be adversely affected by the illegal use of statistical sampling in the 2000 census.

The failure to conduct a timely and legal census in the year 2000 will also injure all local governments that depend so fundamentally upon the census. Common examples of problems include census-based state funding to localities, and state and local government election districts that are redistricted based upon the census. The lack of a lawful census in the year 2000 will cause infinite political and legal chaos among local and state governments.

The only remedy for the above problems is injunctive relief prohibiting the statistical sampling methods; in other words, an order such as that which was specifically authorized by Congress, and which was in fact ordered by the district court in the present action.

The order of the district court should be affirmed in its entirety.

ARGUMENT

PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT.

The City of Omaha supports the district court's finding that the applicable tests for standing have been met by the plaintiffs, particularly the political subdivision plaintiffs. The plaintiffs Cobb County, Georgia, Delaware County, Pennsylvania, and DuPage County, Illinois, ("county plaintiffs") are specifically injured by the use of statistical sampling in the 2000 census.

The question of standing involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As will be noted below, the prudential prong of this test has been easily met by virtue of a specific act of Congress. The plaintiffs, particularly the county plaintiffs, also allege and establish injury that is sufficient to meet the constitutional prong of the test. In this analysis, it is important to note that for purposes of ruling on a motion to dismiss for want of standing, both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Id.* at 501.

A. Prudential Limitations.

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction. *Allen v. Wright*, 468 U.S. 737, 751 (1984). However, in a given case countervailing considerations such as specific constitutional or statutory provisions can outweigh prudential concerns, and thus imply a right of action in the

plaintiff. See *Warth*, 422 U.S. at 500-501. Thus, prudential limitations "can be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161 (1997).

In this way, Congress has effectively abrogated any prudential concerns in this case. Congress has provided that "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law . . . may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1998, Public Law No. 105-119, 111 Stat. 2440, Section 209(b) (hereinafter "1998 Appropriations Act").

That category of "[a]ny person aggrieved" by an unlawful census is indeed huge, and is sufficient to dispel any prudential concerns in the present case. This statutory "aggrieved person" test effectively removes any prudential considerations, short of actual constitutional limits on standing. As can be seen in the next section, the plaintiffs are indeed aggrieved persons with constitutional standing.

B. Constitutional Cases or Controversies.

In *Bennett v. Spear*, this Court restated the three requirements for a justiciable "case" or "controversy" under Article III of the U.S. Constitution:

> [A] plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of

> the defendant, and that the injury will likely be redressed by a favorable decision.

Id., 117 S. Ct. at 1161.

The plaintiffs allege several types of injuries that meet these tests. As was noted above, for present purposes such allegations must be accepted as true, and construed in favor of the plaintiffs. *Warth*, 422 U.S. at 501. Furthermore, plaintiffs' affidavit evidence supports this standing. See, *id.*, at 501-502; affidavit of Dr. Ronald E. Weber (hereinafter "Weber affidavit").

1. Vote Dilution.

As further detailed by the district court memorandum opinion (J.S. App. 11a) and by the plaintiffs' briefing, the individual defendants are directly injured by virtue of vote dilution. Using the 1992 post-enumeration survey, the Weber affidavit shows how the statistical sampling method will result in a shift of population away from areas inhabited by the individual plaintiffs. (J.A. 65-70). The resulting redistricting changes would dilute their votes. *Id.* Voters have sufficient standing in such circumstances of vote dilution. See, *e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). Accordingly, the individual plaintiffs, as voters, have standing.

The City of Omaha wishes to focus on two other aspects of injury that particularly affect the county plaintiffs and the City of Omaha itself: the loss of federal funds, and the dislocation caused by the failure to conduct a lawful census in a timely manner. The county plaintiffs are particularly impacted by these injuries.

2. Loss of Federal Funds.

An unlawful census will have a common financial impact on the county plaintiffs, the City of Omaha, and similarly situated local governmental agencies across the nation. Although the plaintiffs' standing must survive or fail on the plaintiffs' own merits, it bears noting that the broad inclusive language of Section 209(b) of the 1998 Appropriations Act appears to encourage enforcement by "private attorneys general", as a similar legislative provision was characterized in *Bennett*, 117 S. Ct. at 1162 (describing a "statutory scheme to rely on private litigation to ensure compliance" with legislation).

One ground for injury in the present case is the loss of federal funds to the county plaintiffs. This injury is real and imminent, is fairly traceable to the unlawful sampling, and is remediable.

Specific examples show how the statistical sampling will harm local governments such as the county plaintiffs and the City of Omaha. The Community Development Block Grant ("CDBG") program is one of the larger and more well known of the federally funded programs. Federal CDBG funds are provided to local governments for a variety of community improvement purposes. The broad statutory purposes include the elimination of slums and detrimental conditions in existing neighborhoods and residential areas, 42 U.S.C. § 5301(c)(1) and (2); the conservation and expansion of housing, particularly for those of low and moderate income, 42 U.S.C. § 5301(c)(3); economic development of physically or economically distressed areas, 42 U.S.C. § 5301(c)(8); and expansion and improvement of community services, 42 U.S.C.

§ 5301(c)(4). At least 70 percent of the CDBG funds provided to local governments must be used to support activities that benefit persons of low or moderate income. 42 U.S.C. § 5301(c).

Another example is the Emergency Shelter Grant program. Under this program, federal funds are provided to local governments, to facilitate "emergency shelter for homeless individuals." 42 U.S.C. § 11374. This includes funding of homeless shelters and the various service providers that serve the homeless. *Id.*

The Home Investment Partnerships program provides local governments with funding for low or moderate income housing. Again, depending on the particular program, 90 to 100 percent of such funds must go to the benefit of low or moderate income families. 42 U.S.C. § 12744. The funds are to be used for affordable housing opportunities, special needs housing, rental assistance, barrier removal, and other housing-related activities. 42 U.S.C. § 12742.

Of particular relevance to this case are the formulas for calculating federal fund allocations to specific local governments under these programs. The formula for the national allocation of CDBG funds is found at 42 U.S.C. § 5306(b). Under the formula for metropolitan cities, one direct factor in the calculation is either (a) the ratio between "the population of that city and the population of all metropolitan areas," or (b) the ratio between "the extent of growth lag in that city and the extent of growth lag in all metropolitan cities." 42 U.S.C. § 5306(b)(1). 42 U.S.C. § 5306(b)(2) states a similar formula for urban

counties. With respect to the population comparison factor, 42 U.S.C. § 5302(a)(8) further defines "population" as "total resident population based on data compiled by the United States Bureau of the Census and referable to the same point or period in time." Similarly, with respect to the growth lag comparison factor, the term "extent of growth lag" also incorporates the definitional term "population." See, 42 U.S.C. § 5302(a)(12). Thus, under either possibility, CDBG fund allocations are based on population as determined by the Census Bureau.

The Emergency Shelter Grant program is allocated and paid out in similar fashion. The formula for allocations to local governments is found in 42 U.S.C. § 11373. The latter section provides, quite simply, that the percentage of allocation is to be equal to the percentage of allocation determined for the CDBG funding under § 5306. Thus, the CDBG formula is used for this program as well. So again, census results are determinative of the funding for this program, just as they are for the funding of CDBG programs.

Allocations under the Home Investment Partnerships program also depend upon population counts, and thus upon the census. 42 U.S.C. § 12747(b) provides that the formula for the national allocation of these funds is to be set by federal regulation. That allocation is apparently set forth at 24 C.F.R. § 92.50. Subsection (c) of the latter regulation lists six factors to be factored into the formula. One of those factors is "population of a jurisdiction multiplied by a net per capita income (PCI)."

In summary, all of these example programs provide for the appropriation of a finite sum of federal funds.

That finite sum is divided into specific finite sum allocations to local governments and other entities. In each example, the size of the allocation depends on the population served by the relevant local government. Thus, a local government's finite allocation sum might arbitrarily increase or decrease, depending on the census method.

The simple mathematical result on the bottom line is that if a locality's percentage of the national population is decreased, its relative share of federal funding under these programs will also decrease.

This is exactly what has happened to the county plaintiffs. The Weber affidavit details the relative decrease in federal funding that would be incurred by Delaware County and DuPage County. J.A. 70-71. The Weber affidavit proves this loss of federal funding, or at least provides a factual showing sufficient to survive a standing challenge. See, *Warth*, 422 U.S. at 501-502.

The Weber affidavit speaks in terms of real dollars lost by the county plaintiffs. It specifically ties those losses to the use of the statistical sampling method now being employed by the Census Bureau. Thus, the plaintiff counties have suffered an "injury in fact," which is fairly traceable to the statistical sampling being implemented. See, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 510 U.S. 1176 (1994) (city had standing to challenge a census methodology that would result in the loss of federal funds to the city); *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (challenge, by states, cities, and other plaintiffs, of census method was heard and rejected on the merits).

It should also be noted that the plaintiffs' allegations and evidence on the record – particularly including the Weber affidavit – distinguish these plaintiffs from the unsuccessful plaintiffs in *National Law Center on Homelessness and Poverty v. Kantor*, 91 F.3d 178 (D.C. Cir. 1996). As noted above, in the present case the county plaintiffs have alleged, and on at least a preliminary basis, have shown, how they have been injured by the unlawful census procedures. While the plaintiff cities in *National Law Center* failed to prove their damages in opposing a motion for summary judgment, the county plaintiffs in the present case survive any standing objections via the evidence presented, including the Weber affidavit.

The federally funded programs discussed above demonstrate that an unlawful census method affects more than the apportionment of congressional representatives. When Congress and federal agencies set the rules for the federal grant programs described above, they incorporated the use of an assumedly lawful census method. They presumed that the Census Bureau would use a lawful method – *i.e.*, an actual head count – and they based fund allocations upon that presumption. The Census Bureau now for the first time will deviate from that presumed method, and will deviate from applicable sections of the U.S. Constitution and federal statutes.

3. Failure to Perform a Legal Census in a Timely Manner.

Another significant area of injury is the severe dislocation to be caused by the failure to conduct a lawful census in the year 2000. The evils engendered by the

failure to conduct a lawful census include the misallocation of funds at the state and local levels, and the incorrect division of voting districts at state and local levels.

Examples of experiences at the local level demonstrate these injuries. In Nebraska, it is possible to locate at least 19 statutory or constitutional sections that base funding or voting representation upon federal census figures. Several types of state funded aid to municipalities are based on census population figures. See, *e.g.*, Neb. Rev. Stat. § 77-27,137.01 (Reissue 1996) (state aid to municipalities); Neb. Rev. Stat. § 39-2517 (Reissue 1993) (state funding to municipalities for streets); Neb. Rev. Stat. § 18-2603(3) (Reissue 1997) (funding through the municipal infrastructure redevelopment fund).

Census population figures are also the basis for the apportionment of numerous voting districts at the state and local levels in Nebraska. For example, Neb. Rev. Stat. § 32-553 (1996 Cum. Supp.) requires that Omaha's city council districts "be substantially equal in population as determined by the most recent federal decennial census." The section adds that new district boundaries are to be drawn within six months after legislative districts are redrawn pursuant to new census figures. The failure to conduct a lawful 2000 census would call into question the makeup of Omaha's city council. Indeed, with the makeup of the council called into question, the validity of city council actions and legislation would be questionable. Such political and legal chaos injures the City of Omaha and its citizens.

The census results serve as a crucial measuring stick for most of the representative civic institutions that affect

our lives at the state and local level. The aforementioned Neb. Rev. Stat. § 32-553 applies to the governing board of "any political subdivision except a public power district." Other examples in Nebraska abound. State legislature districts are to be redrawn after each federal census. Nebraska Constitution Article III, Section 5. So are Nebraska Supreme Court judicial districts. Nebraska Constitution Article V, Section 5. Other examples of census-based redistricting can be found at Nebraska Constitution Article VII, Section 10 (University of Nebraska Board of Regents); Neb. Rev. Stat. § 32-552 (1996 Cum. Supp.) (school board districts); Neb. Rev. Stat. § 32-504 (1996 Cum. Supp.) (boundaries of congressional districts); and Neb. Rev. Stat. § 70-604 (Reissue 1996) (public power district redistricting).

Similar statutes can be found in the states in which the county plaintiffs are located, namely, Illinois, Pennsylvania, and Georgia. See, *e.g.*, 55 Ill. Comp. Stat. Ann. 5/2-3001 and 3003 (West 1993) (county board districts to be equal in population, as defined by the census); 53 Pa. Cons. Stat. Ann. § 903 (West 1997) (district reapportionment of governing bodies of local government, pursuant to the census); Ga. Code Ann. § 36-35-4.1 (1998 Supp.) (election districts of municipal governing authorities may be reapportioned pursuant to the census).

The legal and political significance of the federal census is woven throughout the fabric of state and local governments. The failure to conduct a lawful 2000 census disrupts the elective and financial processes of state and local governments, and deprives constituent citizens of their rights to fair and representative government.

All of these injuries are remediable now. Section 209(b) of the 1998 Appropriations Act paves the way for a judicial prohibition against the sampling method, specifically allowing a plaintiff in such a case to "obtain declaratory, injunctive, and any other appropriate relief against the use of such method." A final and binding court order against the use of that method, as was entered by the district court (J.S. App. 23a), effectively precludes the defendants from using those specific methods that have been alleged and shown to cause the plaintiffs the particular injuries at issue.

CONCLUSION

The City of Omaha joins with the plaintiffs in praying that the judgment of the district court be affirmed in its entirety.

Respectfully submitted,

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